

Washington Briefing

President signs Y2K Act

The *Year 2000 Readiness and Responsibility Act* (Y2K Act) was signed by President Clinton on July 20, 1999. This legislation is intended to deter "frivolous" and "insubstantial" lawsuits by (1) providing special protections for Y2K defendants and (2) erecting hurdles for plaintiffs, especially those seeking class representative status or punitive damages. The following synopsis of the highlights of the Y2K Act is taken from a summary prepared by Gibson, Dunn & Crutcher LLP.

Applicability—The law applies to "Y2K actions" brought after January 1, 1999, for Y2K failures occurring (or potentially occurring) before January 1, 2003. A "Y2K action" is defined as a civil action (state or federal) where the harm, injury, claim, or defense "arises from or is related to an actual or potential Y2K failure." The Y2K Act does not apply to (1) claims for personal injury or wrongful death, (2) claims arising under securities laws (with one limited exception), or (3) actions brought by a governmental entity in its regulatory, supervisory, or enforcement capacity (with one exception).

Punitive Damages—A defendant will not be liable for punitive damages in a Y2K action unless the plaintiff proves "by clear and convincing evidence" that the applicable standard (which could vary from jurisdiction to jurisdiction) has been met. For small business defendants and individual defendants who have a net worth of less than \$500,000, punitive damages may not exceed the lesser of \$250,000 or three times the amount of any compensatory damages (this provision is not available if the plaintiff proves "by clear and convincing evidence that the defendant acted with specific intent to injure the plaintiff").

Proportionate Liability—The Y2K Act provides for a limited form of proportionate liability in non-contract actions. Under proportionate liability, the defendant is obligated to pay only its proportionate share of the damages, rather than the entire amount of the damages (as could be the case under joint and several liability).

Example: If in a non-contract Y2K action, the plaintiff proves damages of \$100,000, but is itself 10 percent at fault, the recovery is \$90,000. If there are two defendants, one of which is 20 percent at fault and the other is 70 percent at fault, the first defendant would be liable for \$20,000 and the second would be liable for \$70,000.

Determinations relating to proportionate liability (which can be complex) are to be made by the trier of fact (which could be a jury). Proportionate liability is not available to a defendant that acted with specific intent to injure the plaintiff, including knowingly defrauding the plaintiff. Special rules apply in cases of uncollectible shares of a judgment.

The Year 2000 Readiness and Responsibility Act is intended to deter "frivolous" and "insubstantial" lawsuits by providing special protections for Y2K defendants and erecting hurdles for plaintiffs, especially those seeking class representative status or punitive damages.

Pre-Litigation Notice—Before filing a lawsuit, the plaintiff must provide the prospective defendant with a notice that describes the claim, basis for the claim, and requested remedy. The prospective defendant has 30 days to respond to this pre-litigation notice. Among other things, the prospective defendant must state whether it is willing to engage in alternative dispute resolution (ADR). If remedial action or ADR is proposed, the plaintiff must allow 60 days for these activities to occur before filing a lawsuit. If the prospective defendant does not respond to the notice in a timely manner, the plaintiff may file a lawsuit immediately.

Pleading Requirements—Plaintiffs also must provide special information when pleading certain matters in Y2K actions, including the nature and amount of damages sought, description and manifestation of any “material defect” in a product or service, and facts supporting any allegations about a defendant’s state of mind.

Mitigation of Damages—Y2K damages “shall exclude compensation for damages the plaintiff could reasonably have avoided in light of any disclosure or other information of which the plaintiff was, or reasonably should have been, aware, including information made available by the defendant to purchasers or users of the defendant’s product or services concerning means of remedying or avoiding the Y2K failure involved in the action.” This provision does not apply in situations of intentional fraud where there was justifiable reliance by the plaintiff.

Tort Damage Limitations—Economic losses are not recoverable in Y2K tort cases unless such damages (1) are provided for in a contract to which the plaintiff is a party, or (2) result directly from damage to tangible personal or real property.

Class Actions—In order for a Y2K claim (relating to a product or service defect) to be maintained as a class action, the court must find that the defect “would be a material defect for the majority of the members of the class.” Additionally, the court must provide members of the class with a notice describing the case and disclosing details of the plaintiffs’ counsels’ fee arrangement and likely total compensation. Federal courts will have original (but not exclusive) jurisdiction of Y2K class actions, unless (1) the claims are primarily local, one-state disputes, (2) the class does not seek punitive damages and the amount in controversy is less than \$10 million, or (3) the class has less than 100 members.

Other Laws—The Y2K Act does not affect the applicability of any state law that provides stricter limits on damages and liabilities, or greater protection to defendants. Additionally, defendants may continue to rely on the protections against claims based on erroneous statements about Year 2000 readiness or compliance that are included in the *Information and Readiness Disclosure Act of 1998*.

The provisions of the Y2K Act are complex and, in some instances, innovative. This article does not constitute the rendition of legal advice—the application of the law to any party or fact situation should be carefully reviewed with expert legal counsel. The text of the Y2K Act is available at <http://www.senate.gov/~y2k>. ■

Before filing a lawsuit, the plaintiff must provide the prospective defendant with a notice that describes the claim, basis for the claim, and requested remedy. The prospective defendant has 30 days to respond to this pre-litigation notice.